Belcor, Inc. d/b/a San Jose Care and Guidance Center *and* Hospital and Institutional Workers Union, Local 250, Service Employees International Union, AFL-CIO. Case 32-CA-2367

April 17, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND TRUESDALE

Upon a charge filed on December 28, 1979, by Hospital and Institutional Workers Union, Local 250, Service Employees International Union, AFL-CIO, herein called the Union, and duly served on Belcor, Inc., d/b/a San Jose Care and Guidance Center, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on January 11, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on November 20, 1979, following a Board election in Case 32-RC-701 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about December 18, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On January 27, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and requesting that the complaint be dismissed in its entirety.

On February 1, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 6, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed an opposition to the General Counsel's Motion for Summary Judgement in response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits that it has failed and refused, and that it continues to fail and refuse, to recognize or bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit found appropriate. However, Respondent denies that the Union is the exclusive collective-bargaining representative of the employees in the unit. In this regard, Respondent asserts that the certification of representative issued by the Board in Case 32-RC-701 was faulty, void, invalid, and contrary to law.

The General Counsel argues that Respondent's answer raises no *bona fide* or relevant issues of fact, and that, in essence, Respondent's answer denies only the legal conclusions to be drawn from the factual allegations of the complaint admitted by Respondent. Thus, the General Counsel argues that there are no litigable issues warranting a hearing. We agree with the General Counsel.

Review of the record herein, including the record in the representation proceeding, Case 32-RC-701, establishes that pursuant to a Stipulation for Certification Upon Consent Election, approved by the Regional Director for Region 32 on June 1, 1979, an election was conducted on July 6, 1979. The tally was 32 votes for, and 7 votes against, the Union, with 7 challenged ballots, an insufficient number to affect the results of the election. Thereafter, Respondent timely filed objections to conduct affecting the results of the election. Respondent's objections alleged in substance that the Board interfered with the fairness of the election by confusing language and improper instructions set forth in its notice of election and that the Board agent at the election interfered with the fair operation of the election process, the fairness of the voting procedures, and the secrecy of the ballots by allowing nonvoters to remain in the voting areas during election hours; by allowng excessive numbers of people to loiter in the voting area during election hours; by allowing intoxicated and/or disruptive persons to remain in the voting area during voting times; by allowing intoxicated per-

[1] Official notice is taken of the record in the representation proceeding, Case 32-RC-701, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

sons to serve as election observers; by using signs to designate the voting place, as well as notices of election and ballots, which were unintelligible to many voters; and by imporperly and unlawfullly counting several ballots as "Yes" when in fact they were not. Respondent's objections also alleged in substance that the Union, by its agents and supporters, interfered with the fair operation of the election by engaging in surveillance, or creating the impression of surveillance, of the voting area during election hours; by drugging or causing Respondent's election observer to become intoxicated and unable to perform his duties; by making material misrepresentations of law and fact; by making unlawful promises of benefits; by campaigning at or near the polling area prior to and during the voting period; and by promising reduction in or elimination of union initiation fees.

After investigating Respondent's objections, the Acting Regional Director, on August 17, 1979, issued his report and recommendations on objections, in which he found insufficient evidence of any conduct that would warrant setting aside the election, and thus recommended that Respondent's objections be overruled in their entirety.

Thereafter, Respondent timely filed exceptions and supporting brief to the Acting Regional Director's report and recommendations on objections. Therein, Respondent excepted to what it contended were numerous erroneous evidentiary findings and legal conclusions in the report. In sum, Respondent excepted generally to the Acting Regional Director's failure to sustain each of its objections or, in the alternative, to his failure to direct a hearing on the issues raised by the objections.

On November 20, 1979, the Board, after reviewing the record in light of Respondent's exceptions and supporting brief, issued its Decision and Certification of Representative,[2] in which it found that Respondent's exceptions raised no material or substantial issues of law of fact which would warrant reversal of the Acting Regional Director's recommendations that Respondent's objections be overruled in their entirety, or which would require a further investigation or hearing. Thus, the Board adopted the Acting Regional Director's findings and recommendations and certified the Union as the exclusive collective-bargaining representative of the employees in question.

In its opposition to the General Counsel's Motion for Summary Judgment, Respondent renews the contentions it earlier put forth in support of its objections and exceptions to the Acting Regional Director's report and recommendations on objections. Thus, Respondent asserts that a number of substantial and material factual issues remain unresolved, warranting an evidentiary hearing thereon, and thus rendering summary judgment inappropriate. In this regard, Respondent asserts that the results of the election in Case 32-RC-701 were not a fair or accurate indication of employee preference and that the outcome of the election was unlawfully influenced by the actions of the Union, the Board, and their representatives. Respondent denies that it is in violation of Section 8(a)(5) and (1) of the Act, and requests that the Board deny the General Counsel's Motion for Summary Judgment. As indicated above, the Board determined in its Decision and Certification of Representative that there was no basis for reversing the Acting Regional Director or conducting a hearing on the issues raised by Respondent in its objections, and Respondent has failed in support of its position in the instant case to present any evidence not previously considered by the Board in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is now, and has been at all times material herein, a California corporation engaged in the operation of a nursing home facility in San Jose, California. During the past 12 months, a representative period, Respondent, in the course and conduct of its business operations in San Jose, California, derived gross revenues in excess of $100,000 and received revenues from Medi-Cal in excess of $10,000.

[2] Not reported in volumes of Board Decisions.

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Hospital and Institutional Workers Union, Local 250, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time housekeeping department employees, including housekeepers, laundry workers and janitors; dietary department employees, including cooks and kitchen aides; and nursing department employees, including licensed vocational nurses, psychiatric attendants and technicians, and activities assistants, employed by Respondent at its San Jose, California facility; excluding all other employees, registered nurses, charge nurses, office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On July 6, 1979, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 32, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on November 20, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about December 13, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about December 18, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since December 18, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Belcor, Inc., d/b/a San Jose Care and Guidance Center is an employer engaged in commerce

within the meaning of Section 2(6) and (7) of the Act.

2. Hospital and Institutional Workers Union, Local 250, Service Employees International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time housekeeping department employees, including housekeepers, laundry workers, and janitors; dietary department employees, including cooks and kitchen aides; and nursing department employees, including licensed vocational nurses, psychiatric attendants and technicians, and activities assistants, employed by Respondent at its San Jose, California, facility; excluding all other employees, registered nurses, charge nurses, office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 20, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 18, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Belcor, Inc., d/b/a San Jose Care and Guidance Center, San Jose, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Institutional Workers Union, Local 250, Service Employees International Union, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time housekeeping department employees, including housekeepers, laundry workers and janitors; dietary department employees, including cooks and kitchen aides; and nursing department employees, including lincensed vocational nurses, psychiatric attendants and technicians, and activities assistants, employed by Respondent at its San Jose, California facility; excluding all other employees, registered nurses, charge nurses, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at it San Jose, California, facility, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hotel and Institutional Workers Union, Local 250, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time housekeeping department employees, including housekeepers, laundry workers and janitors; dierary department employees, including cooks and kitchen aides; and nursing department employees, including licensed vocational nurses, psychiatric attendants and techinicians, and activities assistants, employed by Respondent at its San Jose, California facility; excluding all other employees, registered nurses, charge nurses, office clerical employees, professional employees, guards and supervisors as defined in the Act.

BELCOR, INC. D/B/A SAN JOSE CARE AND GUIDANCE CENTER